No. 636

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DELIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on December 2, 1942, setting aside convictions under Section 2 (f) of the Federal Firearms Act of 1938.

OPINION BELOW

The opinion of the circuit court of appeals (R. 34–39) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 2, 1942 (R. 34). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether Section 2 (f) of the Federal Firearms Act, which provides that the possession of a firearm or ammunition by "any person who has been convicted of a crime of violence or is a fugative[1] from justice * * * shall be presumptive evidence that such firearm or ammunition was shipped or transported or received" in interstate or foreign commerce in violation of the act, is unconstitutional under the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 2 (f) of the Federal Firearms Act, 52 Stat. 1251, 15 U. S. C., Section 902 (f), reads as follows:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugative[1] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or for-

[1] So in original; probably should be fugitive.

> eign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

STATEMENT

On January 22, 1942, Delia was convicted in the United States District Court for the Eastern District of Michigan upon a two-count indictment charging violations of Section 2 (f) of the Federal Firearms Act (R. 1, 6–7). The first count (R. 6) alleged that on September 25, 1941, Delia "was a person who had been previously convicted of * * * robbery while armed"[2] and that on the same day he did receive and possess a "Victer 38-caliber, double action * * * revolver, which firearms had theretofore been shipped and transported in interstate commerce" (R. 6). The second count repeated the allegation of the previous conviction and alleged further that Delia did receive and possess "two 38-caliber Peters cartridges and three R. W. S. 38-caliber cartridges, which had been theretofore shipped and transported in interstate commerce" (R. 6–7) The court on January 23, 1942, sentenced Delia to five years' imprisonment on both counts, the sentences to run consecutively (R. 2).

[2] Armed robbery is a "crime of violence" for the purposes of the Act. See Section 1 (6), 52 Stat. 1250, 15 U. S. C., Section 901 (6).

The agreed statement of facts may be summarized as follows:

Witnesses for the Government testified that on September 25, 1941, Delia had in his possession in the City of Detroit, Michigan, a Victor .38-caliber revolver loaded with two .38-caliber Peters cartridges and three R. W. S. cartridges of the same caliber (R. 9). It was also shown by the Government that the pistol was manufactured in Massachusetts before 1920 (R. 12, 15), and that the cartridges were manufactured in Ohio and Germany (R. 13–14); the Government introduced, however, no evidence to show that Delia received, shipped, or transported either the gun or the cartridges in interstate commerce (R. 9).

Delia testified that he picked the pistol up in self-defense after it had been dropped by one of several persons attacking him (R. 8–9). Witnesses for the Government testified that they did not "see the revolver dropped by anyone and picked up by Delia as he claimed" (R. 9).

The circuit court of appeals reversed the convictions on both counts on the ground that the presumption provided in Section 2 (f) is unreasonable, arbitrary, and capricious, and therefore violative of the due process clause of the Fifth Amendment, in that there was no "rational connection" between the fact which must be proved to make the presumption operative and the ultimate fact inferable by virtue of the presumption.

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the presumption clause of Section 2 (f) of the Federal Firearms Act is unconstitutional.

REASON FOR GRANTING THE WRIT

The decision of the circuit court of appeals that the presumption in Section 2 (f) of the Federal Firearms Act violates the due process clause of the Fifth Amendment is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Frank Tot* v. *United States*, decided October 28, 1942, and now pending on petition for a writ of certiorari, No. 569, October Term, 1942, and with the decision of the Circuit Court of Appeals for the First Circuit in *Jose Velazquez* v. *United States*, decided November 27, 1942. In our memorandum in the *Tot* case we have not opposed the granting of the petition insofar as it raises the constitutionality of the presumption provided in Section 2 (f). The same question is presented in our petition for a writ of certiorari filed this day to review the judgment of the circuit court of appeals in *William Minski* v. *United States*. The instant case and the *Minski* case, though tried separately, were decided by the court below in one opinion.

CONCLUSION

For the foregoing reason it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

January 7, 1943.

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